SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 234

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

HODGE, JACKSON, KUMLER & CROSKEY,
By MORTON B. JACKSON,
1901 Avenue of the Stars,
Suite 1651,
Los Angeles, Calif. 90067.
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	1
Grounds for Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	5
Argument for Allowance of Writ	12
Opinion of the Court of Appeals Herein Constitutes a Misapplication of Decisions of This Court	14
The Opinion of the Court of Appeals Below Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter	17
The Opinion of the Court of Appeals Below Has Decided (Erroneously, We Submit) Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court	19
Conclusion	22
Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1
Appendix B. Labor Management Relations Act, 1947, as Amended by Public Law 86-257, 1959	App. p. 10

TABLE OF AUTHORITIES CITED

Cases	Page
American Ship Building Co. v. N.L.R.B., 380 U.S. 300, 12 L. Ed. 2d 855, 85 S. Ct. 955	4, 11, 13, 14, 15, 19, 20
Colgate-Palmolive Peet Co. v. N.L.R.B., 338 U.S. 355, 94 L. Ed. 161	16, 17
Deluxe Metal Furniture Co., 121 NLRB 995	19
Ensher Alexander & Barsoom, Inc., 74 NLRB 1443	17, 20
Johnson v. Nelson, 325 F. 2d 646	16
Midwest Piping & Supply Co., 63 NLRB 1060	19, 20
NLRB v. Golden State Bottling Company, etc., 353 F. 2d 667	16
NLRB v. Kellogg's, Inc., 347 F. 2d 219	21
NLRB v. North Electric Company, 296 F. 2d 137	17
NLRB v. Servette, Inc., 377 U.S. 46	20
NLRB v. Swift & Co., 294 F. 2d 285	16, 17, 18, 19, 20
NLRB v. Tonkin Corporation of California, etc., 352 F. 2d 509	6, 11
Portland Associated Morticians, Inc., 163 NLRB No. 76	19
Rold Gold of California, 43 LRRM 1421, 123 NLRB No. 24	17
St. Louis Packing Co. v. NLRB, 291 F. 2d 700	17, 21
Snow v. NLRB, 308 F. 2d 687	21
Stewart Warner Corp., 31 LRRM 1397, 102 NLRB No. 310	17
Tonkin Corporation of California, etc. v. NLRB, 147 NLRB No. 48	1

Page

Tonkin Corporation of California, etc. v. NLRB, 158 NLRB No. 110 2

William Penn Broadcasting Co., 93 NLRB 1104 .. 18

Rules

United States Code, Title 28, Sup. Ct. Rule 19 ....3, 14

Statutes

Landrum-Griffin Act, Sec. 501(a) 5

Landrum-Griffin Act, Sec. 501(b) 5

National Labor Relations Act, Sec. 1(a) 4

National Labor Relations Act, Sec. 7 4

National Labor Relations Act, Sec. 8(a)(1) ....4, 5, 10 .....11, 14, 17

National Labor Relations Act, Sec. 8(a)(2) ....4, 5, 10 .....11, 16, 17

National Labor Relations Act, Sec. 8(a)(3) ....4, 5, 10 .....11, 14, 15, 16

National Labor Relations Act, Sec. 8(a)(5) 20

National Labor Relations Act, Sec. 8(b) 13

National Labor Relations Act, Sec. 8(c) 4

National Labor Relations Act, Sec. 8(d) 4, 13, 16

National Labor Relations Act, Sec. 10(e) 2, 4, 5

National Labor Relations Act, Sec. 10(f) 2, 4, 5

United States Code, Title 28, Sec. 1254 3

United States Code, Title 29, Sec. 160 12

United States Code, Title 29, Sec. 501(a) ..4, 5, 12, 16

United States Code, Title 29, Sec. 501(b) ..4, 5, 12, 16

United States Code Annotated, Title 19, Sec. 157 .. 5

Page

United States Code Annotated, Title 19, Sec. 158-(2) 5

United States Code Annotated, Title 29, Sec. 151-(a) 5

United States Code Annotated, Title 29, Sec. 151-(3) 5

United States Code Annotated, Title 29, Sec. 158-(a)(1) 5

United States Code Annotated, Title 29, Sec. 158-(b)(3) 5

United States Code Annotated, Title 29, Sec. 158-(c) 5

United States Code Annotated, Title 29, Sec. 158-(d) 5

United States Code Annotated, Title 29, Sec. 160-(e) 2, 5

United States Code Annotated, Title 29, Sec. 160-(f) 2, 5

IN THE

Supreme Court of the United States

October Term, 1967

No. .....

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento, petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on 29 March, 1968.

Opinions Below.

The original Decision and Order (hereinafter referred to as the "Original Order") of the National Labor Relations Board (hereinafter referred to as the "Board") in this cause is reported as 147 NLRB No. 48.

The first opinion in this cause, then No. 19714, Mathes, Senior District Judge, enforcing that Original

Order in part and remanding in part to the Board for reconsideration, is reported as 352 F. 2d 509 (9th Cir. 1965).

Pursuant to the direction of the Court of Appeals on remand, the Board, on 27 May, 1966, issued its Supplemental Decision and Order (hereinafter referred to as "Supplemental Order") reported as 158 NLRB No. 110.

The Opinion of the United States Court of Appeals for the 9th Circuit (hereinafter referred to as "Opinion"), on review of the Supplemental Order, denying the Petition for Review and granting the Board's Cross-Petition for Enforcement is reported as 392 F. 2d 141 (9th Cir. 1968), and is printed and attached hereto as Appendix "A".

Grounds for Jurisdiction.

Petitioners, in the Court of Appeals, sought review of the Supplemental Order in the cause, now numbered 21130. The Board cross-petitioned for its enforcement. The Court had jurisdiction pursuant to the National Labor Relations Act, Section 10(e) and (f) as amended 29 U.S.C.A. Sec. 160(e) and (f), (hereinafter referred to as the "Act").

The Court denied the Petition for Review and granted the Cross-Petition for enforcement, erroneously, we submit.

The Opinion of the Court of Appeals is dated 29 March, 1968, and was filed and entered the same date; Petitioner requested a rehearing 26 April, 1968, which was denied by the Court 14 May, 1968.

Petitioner urges that the Opinion decides an important question of federal law which has not been,

but should be, settled by this Court; decides a federal question in a way which conflicts with applicable decisions of this Court; and decides a question in conflict with the decisions of other Courts of Appeals on the same point.

Therefore, pursuant to 28 USCA § 1254, and U.S. Sup. Ct. Rule 19, 28 USCA, petition is made to this Court for a Writ of Certiorari to review the Opinion below.

Pursuant to application, the Court of Appeals granted a thirty (30) day Stay of Mandate on 20 May, 1968; this was extended for a further thirty (30) days pursuant to order made on 13 June, 1968.

No order has been sought or granted for an extension of time in which to petition for certiorari.

Questions Presented.

Five questions of major importance to labor management relationships are ultimately involved in the instant cause:

1. Is it an unfair labor practice for an employer to express a preference for continued dealing with the longtime representative of its employees for collective bargaining purposes where the employer is under the erroneous impression that a rival union is desirous of supplanting the incumbent union (herein referred to as "Incumbent") but where no question of representation is or has been presented?

2. Under the foregoing circumstances, is it an unfair labor practice for the employer to pursue negotiations with the Incumbent and to bargain to agreement, even though the employer may be motivated in part by a wish to preserve the continuity and stability of the

historic bargaining relationship through the instrumentality of the agreement sought (and actually achieved)?

3. Under the foregoing circumstances, may the officers of the Incumbent, having bargained to agreement with the employer, *subsequently,* with impunity, seek to frustrate that agreement and to subvert the bargaining process by proselytizing their own membership on behalf of a rival union, in violation of their duty to bargain in good faith and of the fiduciary duties imposed by 29 USCA § 501 (a), (b) and, in so doing, cast upon the employer the onus of resisting this conduct and defending the agreement at its peril?

4. Having bargained to agreement under the foregoing circumstances, may an employer, under *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965) (hereinafter referred to as *American Ship*) lawfully utilize the lockout in support of its position in insisting that the Incumbent honor the agreement previously reached and execute a written contract embodying that agreement?

5. Or, on the other hand, is an employer, in order to preclude unfair labor practice charges in such circumstances, obliged to suspend negotiations, abrogate the agreement concluded, and withdraw recognition of the Incumbent upon hearing that a rival union is actively proselytizing its employees, but where no question of representation, demand for recognition, nor any claim of majority status whatever has been presented?

Statutes Involved.

The statutes involved in the cause herein are the Labor Management Relations Act §§ 1(a); 7; 8(a)(1), (2), (3); 8(b)(3), (c), (d); 10(e), (f), as amended

29 U.S.C.A. §§151(a); 157; 158(a)(1), (2), (3); 158(b)(3); 158(c); 158(d); 160(e); 160(f); and the Landrum-Griffin Act, §§501(a) and (b), 29 U.S.C.A. §§ 501(a) and (b). The statutes in pertinent part are printed verbatim and are attached hereto as Appendix "B".

Statement of the Case.

This is an action arising from charges filed with the Board claiming that Petitioner had committed violations of § 8 (a), (1), (2), (3) and (5) of the Act. The court below had jurisdiction by virtue of § 10(e) and (f) of the Act.

Petitioner is engaged in the business of bottling and distributing soft drink products, including 7-Up, in the Sacramento area. The Seven-Up Employees' Union (hereinafter referred to as the "Incumbent") had been the bargaining representative for many years for Petitioner's plant employees and route salesmen [Opinion, p. 1].[1]

At the time of the events in question, a contract was in existence between Petitioner and the Incumbent which was to expire 31 March, 1963 [Tr. 410-412; 414; 420].

Early in 1963, the members of the Incumbent began considering terms they wished to have incorporated into the new contract and submitted a series of demands to the employer [Op. p. 2; Tr. 13; 49-50]. The parties met in negotiations several times over several weeks without reaching agreement [Resp. Br. p. 3; Tr.

[1]References to the Opinion will be indicated herein by "Op."; Opinion page references shall be to pages in Appendix A; references to the transcript of record, by "Tr."; "Pet. Br." will indicate Petitioner's opening brief below; "Resp. Br." will indicate Respondent's brief below.

13-18; 87-88; 245-253; 293-294]. On 27 March, four days before the existing contract was to expire, the employees rejected the Petitioner's most recent offer [Tr. 15-18]. A meeting was called by Petitioner for Friday, 29 March, 1963, to explain its position [Op. p. 2].

Petitioner's president, Harry Tonkin, made several proposals, including a wage increase, overtime pay, and an offer to match any increase in wages paid by other local soft-drink companies, in what amounted to a "most favored nation" clause [Op. p. 2; Tr. 255-6; 295-6]. Other matters relating to proposed terms of the contract were discussed [Op. p. 2; Tr. 21-2; 255-8; 295-6]. Tonkin agreed to reconsider the basis for recomputing the route salesmen's bonus and to discuss further the matter of holidays and sick leave [Op. p. 2; Tr. 255-60; 295-6].

Tonkin stated that he had heard rumors of Teamster organizational activities among his employees (Actually, Tonkin was in error in his statement, since it is undisputed that the first contact had by the employees with the Teamsters was on the following Sunday, 31 March) [Op. p. 2;[2] Tr. 26-7]. He pointed out some of the benefits of independent union membership and mentioned certain disadvantages of Teamster affiliation [Tr. 21; 161; 271-3; 295-6]. He stated that he intended to deal within the framework of the existing collective bargainting relationship and continue negotiating with the Incumbent, and that he wished to have a

[2]The opinion of the Court in the orignal case, *NLRB v. Tonkin Corporation, etc.*, was, therefore, mistaken when it declared: "The record also discloses evidence of side-line proselytizing efforts on the part of the Teamsters' Union, which were intimately interlaced with . . . the earlier company—union contract negotiations." (352 F. 2d 509, 510-11).

contract before the men went to work Monday [Tr. 59-60; 257-8].

The meeting was adjourned, the Tonkins withdrew, and the members discussed the Petitioner's proposals. There was a general consensus to accept the proposals in view of the overtime and "most favored nation" terms [Op. p. 3].

Since Harry Tonkin had already indicated management's willingness to match whatever increase was paid in the industry [Tr. 256], it was the general understanding of the men when the meeting ended that things were settled, the terms agreed to, and that a contract would be signed as a member of course on Monday morning [Tr. 83; 100; 334; 340; 350-1]. The negotiating committee was authorized to convey this acceptance to the Tonkins.

The union negotiating committee, consisting of Incumbent officers, President Howard Hill, Secretary-Treasurer William Barwise and Directors Olson and Williams, then went to the Petitioner's office to state that the members had agreed to accept the wage increase, overtime and the "most favored nation" clause [Op. p. 3].

Other matters were discussed at this meeting and Tonkin made oral concessions on the issue of paid holidays and sick leave [Op. p. 3; Tr. 25-6; 100-02; 83; 178-83; 260-4; 297-9]; agreement was made to re-examine and improve the driver-salesman bonus system, a commitment, in fact, fullfilled [Op. pp. 1 and 3; Tr. 109]; Petitioner further agreed to improve the disability and health programs when financially able, even though in the preceding year it had voluntarily instituted a better plan than before [Op. p. 3]. In addition, the Tonkins agreed to consider a pension plan, but pointed out that Petitioner was not yet financially able to qualify for one [Tr. 25-6; 83; 100-02; 109; 178-83; 260-4; 297-9].

When the meeting broke up, the parties shook hands. The Incumbent negotiating committee informed the management they would have to submit the agreement for ratification to the full membership and that a meeting would be held for that purpose before work Monday morning, April 1 [Op. p. 4; Tr. 297-9; 183].

Sunday, 31 March, at Barwise's suggestion, he, President Hill and Director Williams, attended a meeting with a representative of the Teamsters [Op. p. 4; Resp. Br. p. 5; Tr. 26-7]. This was the *first* contact between any of Petitioner's employees and the Teamsters. There they signed Teamster cards and, later in the day, solicited several other Incumbent members on behalf of the Teamsters [Op. p. 4; Tr. 288; 335-6; 341-2].

When the men reported for work on Monday morning, April 1, they found that the gate to the adjoining parking lot, where Petitioner's trucks were kept, was locked. At the hearing before the Board, Tonkin testified that he did not unlock the gate in the morning simply because he wanted to insure that early starters would not leave on their routes without being notified of the Union meeting to be held for ratification of the contract [Op. p. 4]. This is the act of the Petitioner which the Court and the Board have characterized as the "lockout".

At the meeting, the officers, instead of urging ratification of the agreement they had negotiated, solicited further signatures on behalf of the Teamsters, and, as a consequence, the contract failed of ratification by a vote of nine to eight.

Tonkin was told of this and expressed dismay. He indicated that he intended to hold the Union to the

agreement reached on 29 March and would insist upon ratification [Op. p. 4]. The contract was rejected a second time by the same vote [Op. p. 4].

A number of the men were completely puzzled by the whole proceeding since they, as the Tonkins, had assumed matters to have been satisfactorily settled the preceding Friday and were at a loss to understand what all the milling around was about that morning [Tr. 337-8; 340-4; 347; 350-2].

A second meeting was held in Petitioner's office, and Tonkin stated that he had been informed by counsel that the oral agreement reached Friday night was valid and binding and he felt the Incumbent was obligated to sign the contract embodying that agreement. He hoped and expected that he could rely upon the integrity of the Incumbent officers, and if the officers did not recognize this, perhaps the Incumbent should elect new officers. The men met again, the members commenced filing into the plant, and the contract was signed by Barwise and Hill [Op. p. 5].

The following day, 2 April, the Teamsters filed a petition with the Board for a representative election among Petitioner's employees. This was the first and only action taken by the Teamsters to achieve representative status and even this did not come to the Petitioner's attention until 5 April, when Petitioner and the Incumbent received letters from the Board informing them of the Petition and requesting a copy of the contract, if any, they had entered into.

The Union's president, Hill, asked the Tonkins after work on April 5, if they had received the letter from the Board. Hill stated that he had no means by which to make copies of the contract. Tonkin stated that he

would send copies in for the Union if they so desired. Hill replied that he would contact the Union's attorney. Instead, the Union contacted a representative of the Teamsters [Op. p. 5; Tr. 38-9] who informed them that it made no difference whether they sent a contract in. Hill informed management that, as far as the Union was concerned, management had complete discretion in either sending in a copy for the Union or not. Tonkin sent a copy in for management and also one for the Union, giving the Union's return address [Op. pp. 5-6]. This act of Petitioner has been stigmatized by the court below (and the Board) as evidencing anti-Teamster bias.

The original unfair labor practice charge was filed 5 April, 1963. On 9 April, Barwise was discharged. The Tonkins stated this was because of his poor performance as a route salesman and because his sales had fallen off sharply. An amended charge was filed some seven weeks later, 29 May, alleging unlawful discharge of Barwise.

The Board's Complaint charged Petitioner with violation of § 8 (a), (1), (2), and (3) of the Act. Subsequent to hearings on the charge, held during August, 1963, before a Trial Examiner, the Board, on 10 June, 1964, issued its Decision and Order thereon, (147 NLRB No. 48). It was charged, but *not* found, that the Incumbent was dominated or assisted unlawfully by Petitioner. The Board did find that Petitioner had violated the aforesaid sections of the Act by unlawfully interfering with the administration of the Incumbent otherwise interfering with the rights of employees secured to them by the Act in locking them out, and by discharging Barwise from its employ. It should be noted

that the Trial Examiner's findings and the Board's Original Order were made prior to this Court's decision in *American Ship.* Thereafter, on 10 November, 1965, the Court issued its decision enforcing the Original Order in part, (pertaining to the discharge of Barwise in an admittedly close case) *NLRB v. Tonkin Corporation, supra,* at 511, and remanding the balance of the matter to the Board for further consideration in light of the *American Ship* decision, *supra.* On May 27, 1966, the Board, pursuant to direction of the Court on remand, issued its Supplemental Order, (*supra*).

In its Suplemental Order, the Board relied upon: (1) Tonkin's statements at the 29 March and 1 April meetings; and (2) coupled them with his subsequent sending of the copies of the contract to the Board on behalf of the Incumbent to find that Petitioner's purpose in (3) locking out its employees was to prevent them from having a free choice in determining their bargaining representative, to encourage membership in the Incumbent, and discourage membership in the Teamsters. Petitioner was, therefore, held to be in violation of § 8 (a) (1), (2) and (3) of the Act.

The Court below upheld the Board, stating that the record in the case supported the Supplemental Order. The Court found that in keeping the gates locked on 1 April, Petitioner's purpose was to prevent its employees from freely determining their bargaining representative and otherwise keeping the Incumbent "subservient" to it as a bargaining representative.

Citing the three incidents relied upon by the Board, the Court stated there was substantial evidence to support the Board's finding that Petitioner violated § 8 (a) (1), (2) and (3) of the Act.

ARGUMENT FOR ALLOWANCE OF WRIT.

As stated above, five general questions of major importance to labor-management relations await resolution in substantial part by the ultimate decision in this case.

Generally, the questions involve policies of the National Labor Relations Act 29 U.S.C.A. § 151 *et seq.* (hereinafter referred to as the "Act"), the decisions under that Act, and their reconciliation with the issues in this case.

Specifically, where an employer and the union that legally represents its employees are engaged in collective bargaining, does the mere existence of a rival union that desires to supplant the Incumbent, but which has made no effort to claim representation, nor to demand recognition, require that the employer remain silent, or may the employer express its preference for continuance of negotiations within the current bargaining relationship?

Similarly, there arises a serious conflict between the employer's well settled duty to continue to bargain with the Incumbent union under the foregoing circumstances and what appears to be a contrary duty, imposed by the Court's opinion, to suspend negotiations, abrogate an agreement reached, and withdraw recognition from the Incumbent, thus exposing itself to an unfair labor practice charge of refusal to bargain (a charge which in fact was made in this case, but not prosecuted for obvious reasons).

Further, questions are presented regarding application of the fiduciary duty imposed upon union officers, by 29 USCA § 501 (a) and (b), to the duty of the union to bargain with the employer in good faith pur-

suant to § 8 (b) and (d) of the Act, *vis a vis* the duty of the employer to bargain in good faith with the union. Here the union officers, having bargained to agreement with the employer, subsequently attempted to subvert that agreement and the acknowledged bargaining relationship, as well as the bargaining process itself, by actively proselytizing its members on behalf of the rival union and counseling against ratification of the very agreement they had negotiated.

May not the employer rely and insist upon fulfillment of these duties?

Under the foregoing circumstances, the Court is asked to review the Opinion of the court below, which offers a new and antithetical interpretation of *American Ship*. The court below has held to be unfair labor practices an employer's temporary lockout in support of its legitimate bargaining position, and employer activity in support of the continuing bargaining process in observance of its well settled duty to recognize and negotiate with the acknowledged and long-time representative of its employees. This conduct has been converted into an unfair labor practice by the mere presence of a rival union of unknown strength, which makes no demand for recognition nor claim of representation, and thus is outside the bargaining process, and by the activities of Incumbent union's officers on behalf of that rival union.

Petitioner contends that the cause herein presents a context within which this Court can reaffirm the policies of the Act regarding a stable, good faith, collective bargaining relation, and the concomitant rights and duties involved therein, which, we submit, have been radically altered by the Court below.

We believe the importance of these questions themselves argues for the issuance of the Writ in this case. However, with specific reference to the criteria enumerated by Rule 19, we discuss the matter further below.

Opinion of the Court of Appeals Herein Constitutes a Misapplication of Decisions of This Court.

We submit that the Opinion of the Court of Appeals herein is in conflict with the applicable rules and policy enunciated by this Court in *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965).

In *American Ship, supra,* the majority held that it was not an unfair labor practice within the meaning of § 8 (a) (1) and (3) of the Act, for an employer to lock out its employees temporarily with the sole object of applying economic pressure to support a legitimate bargaining position, after an impasse in collective bargaining negotiations has been reached (*Id.* at 308).

In so holding, the Court emphasized that there was "no allegation that the employer used a lock-out in the service of designs inimical to the process of collective bargaining. There is no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining, or that the lockout was designed to discipline them for doing so." (*Id.* at 308-309).

The Court of Appeals below has held that the record supports the Board's finding that Tonkins' purpose in the lockout was to prevent its employees from freely determining their bargaining representative and other-

wise keeping the union "subservient" to it, thus precluding the application of the *American Ship* decision to the lockout.

We urge that even though the employer may have preferred to continue to deal with the Incumbent, this does not (under the facts) constitute unlawful motivation or purpose. The negotiations and conclusion of agreement both antedated all contact with the rival Teamsters, and even at the time of the lockout, no question of representation had arisen. In fact, the lockout antedated not only the Teamsters' petition, but the events which called it to Petitioner's notice.

As a general matter, it cannot be said that a lockout will necessarily destroy the union's capacity for effective and responsible representation (*Id.* at 309). And in this case, the evidence does not show that the lockout impaired the ability of the Incumbent to represent the employees. That ability was unaffected by the lockout. If there was any such impairment, it could only be attributed to the defection of the Incumbent's officers. There is no showing that the Incumbent was "subservient" to Petitioner at any time. Indeed, the effectiveness of the Incumbent's representation is cogently evidenced by the number and significance of the concessions it wrung from Petitioner.

The proscribed motivation to show violation of § 8 (a) (3) of the Act is a discrimination in tenure and other conditions of employment to discourage union membership, and a resulting discouragement of union membership generally. The Supplemental Order of the Board and the Opinion of the Court show no such motivation on the part of the Petitioner; and if there was

discouragement of union membership, it must again be attributed to the conduct of the Incumbent's officers.[3]

By the same token, since there was not then (or ever) presented any real or cognizable question of rival union representation, it should not be construed as a violation of § 8 (a) (2) to insist that the Incumbent execute in writing the agreement previously arrived at, as provided in § 8 (d) of the Act. *NLRB v. Golden State Bottling Company,* 353 F. 2d 667 (9th Cir. 1965); *NLRB v. Swift & Co.,* 294 F. 2d 285 (3d Cir. 1961).

Again, the desire for stability and continuity in a collective bargaining relationship, as envisioned by the Act, should not be transmuted to improper motivation merely by the advent of a rival union of unknown strength and activity, and the activities of the Incumbent officers in violation of § 29 U.S.C. 501 (a) and (b).

---

[3]See *Colgate-Palmolive-Peet Co. v. NLRB,* 338 U.S. 355, 94 L. Ed. 161. This Court reversed the court below and ordered a dismissal of the Complaint charging that employer violated § 8 (a) (3) of the Act. The employer had discharged several employees at the request of the bargaining representative pursuant to a valid closed-shop agreement, on the grounds that they were no longer "members in good standing" of the union, as required by the contract, because they had been actively proselytizing on behalf of a rival union.

This Court stated "It must be remembered that this is a contest primarily between labor unions for control. It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative regardless of internal disruptions growing out of agitation for a change in bargaining representative. In the instant case the employees exercised their right to choose their bargaining representative. The representative bound them to a valid contract. The contract was lived under for four years and was subsisting at the period of time in question. It was made and carried out in good faith by petitioner, who cannot be held guilty of an unfair labor practice by administrative amendment of the statute." (at p. 364). See also *Johnson v. Nelson,* 325 F. 2d 646, 650 (8th Cir. 1963).

In this case, the lockout was not inimical to the bargaining process, but, on the contrary, was supportive of the position taken in good faith during and preceding the negotiations and, therefore, *supportive* of the collective bargaining process itself.

So long as an employer is obliged to continue recognition and negotiations, it is hardly consistent or fair to hold that he may not *desire* to continue that relationship or resist the *post facto* efforts of an incumbent's officers to repudiate an agreement between the employer and the union. Indeed, it is the policy of the Act and the Board to encourage such desire. (*Stewart Warner Corp.*, 31 LRRM 1397, 102 NLRB No. 310 (1955); *Rold Gold of California*, 43 LRRM 1421, 123 NLRB No. 24 (1959); *Colgate-Palmolive-Peet Co. v. N.L.R.B., supra; N.L.R.B. v. Swift & Co.*, 294 F. 2d 285 (3d. Cir. 1961); *Ensher, Alexander & Barsoom, Inc.*, 74 NLRB 1443, 1445 (1947).)

The Opinion of the Court of Appeals Below Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

We submit that the Opinion below conflicts with the decision in *NLRB v. Swift & Co.*, 294 F. 2d 285 (3d Cir. 1961).[4] (hereinafter referred as *"Swift"*).

In the *Swift* case, the Court declared that it was not a violation of § 8 (a) (1) or (2) of the Act for an employer to enter into an agreement with a previously certified union even while a petition for an elec-

---

[4]See also *NLRB v. North Electric Company*, 296 F. 2d 137 (6th Cir. 1961); *St. Louis Independent Packing Co. v. NLRB*, 291 F. 2d 700, 704 (7th Cir. 1961).

tion is pending, and it refused to enforce the Board's order to the contrary.

The Court held there must be a finding of a *real* question of representation; *i.e.,* that the employer had a reasonable basis for believing that the incumbent union no longer represented a majority.

The Board relied upon the filing of a petition for representation by a rival union and an administrative determination that a hearing thereon should be held to show a "real question" of representation.

No election was ever ordered or held. The court stated at page 288, "These facts, we think, are clearly insufficient, for at most they establish the existence of a *naked claim* on the part of the meat cutters to majority representation." (Emphasis added).

Of course, a real question of representation can arise in another way not present here. In the cause herein there was no question *at all* of representation. All the pertinent activities took place prior to Petitioner's actual knowledge of Teamster activity and prior to the filing of the Teamster petition. It is the responsibility of the general counsel of the Board to show by a preponderance of evidence that a real question exists. *William Penn Broadcasting Co.,* 93 NLRB 1104 (1951); *Swift, supra,* at 287.

There is no such finding in this case, and yet the court has held that this employer violated the Act when it continued to bargain and deal with the Incumbent and to utilize the economic weapons at its disposal in support of such dealing—in flat contradition to the rule enunciated in *Swift.*

The Opinion of the Court of Appeals Below Has Decided (Erroneously, We Submit) Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

The Opinion of the Court of Appeals supported the Board's Supplemental Decision that *American Ship, supra,* was not controlling because of the "unlawful purpose" it attributed to the Petitioner in locking out its employees. It asks, "If a contract was, in fact, made on March 29, why was Petitioner so concerned to have its employees sign it on Monday morning, unless he wanted to use the signed Contract to prevent the Teamsters from organizing its employees?" [Op. p. 9].

However the Board itself has held, in the interest of stability of labor relations, that an employer may deal freely with the majority union and execute an agreement prior to the filing of an outside representation petition, even though he may be aware of a rival union's organizing campaign, and even though a "bare claim" shall have been made. *Deluxe Metal Furniture Co.,* 121 NLRB 995, 999 (1958); *Portland Associated Mortician's Inc.,* 163 NLRB No. 76 (April 2, 1967); see *NLRB v. Swift & Co., supra.*[5]

---

[5]In discussing whether the employer has a duty to deal with the incumbent union in the face of the filing by a rival union of a representative petition with the Board and an administrative determination that a hearing should be held thereon, the court had to determine whether a real question of representation existed. It cites the Board's own language in determining whether or not the Midwestern Piping doctrine, *Midwest Piping & Supply Co.,* 63 NLRB 1060 (1945), should be applied

(This footnote is continued on the next page)

If this is so, then we submit that, just as the employer may deal with a majority union, so may he lock it out, and, *a fortiori,* threaten to do so. *NLRB v. Servette, Inc.,* 377 U.S. 46 at page 57. The lockout is an integral part of the employer's approach to collective bargaining, so long as the employer does not use it in the service of designs inimical to the process of collective bargaining, *American Ship, supra,* at 308-309, or to discourage union membership generally.

There is nothing in the language of *American Ship* to suggest that this Court intended that the employer's right to lock out, in support of its legitimate bargaining position, hinged upon the presence or absence of a rival union of unknown strength, *though this is the precise effect of the Court of Appeals' ruling.*

Indeed, until presented with concrete evidence in the form of a rival demand for recognition or a claim of representation, the Company was obligated under the law to negotiate with the Incumbent. It could not have assumed that the Teamsters had majority support and therefore cease dealing with the Incumbent on that ground without violating § 8 (a) and (5) of the Act.

---

in a given case. ". . . That doctrine, necessary though it is to protect freedom of choice in certain situations, *can easily operate in derogation of the practice of continued collective bargaining, and should, therefore, be strictly construed and sparingly applied.*" (Emphasis added). *Ensher, Alexander & Barsoom, Inc.,* 74 NLRB 1443, 1445 (1947).

It should be noted that in *Midwest Pipe* there was found a real question of representation. In *Swift* and *Ensher* there was no finding of a real question of representation. The cause herein, therefore, sets forth an *a fortiori* case, since there is no question *at all.*

(*NLRB v. Kellogg's Inc.*, 347 F. 2d 219 (9th Cir. 1965); *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962); *St. Louis Independent Packing Co. v. NLRB, supra*, at p. 705.

The Court's decision below has offered the Petitioner a Hobson's choice: notwithstanding that the Teamsters had made no cognizable claim of representation nor demand for recognition, Petitioner nonetheless, without knowing the extent of Teamster activity or the extent of employee support for that activity, is apparently required to anticipate a Teamster claim or demand and withdraw recognition and cease negotiations with the Incumbent on these assumptions. Under existing court decisions this conduct would subject Petitioner to charge of unfair labor practice and would be in derogation of the policies of the Board itself. In the alternative, Petitioner could have continued to bargain in good faith within the historic bargaining relationship, as it chose to do, to its equal misfortune, since the Court in this cause has held it to be in violation of the Act for doing so.

The policy of the Act as enunciated by the Board and by the courts has been to encourage bona fide bargaining within a stable and continuous relationship, so long as there is no real question of alternative representation found. It is submitted that no such question existed or was found and that Petitioner has acted in consonance with these policies, only to be held in violation of the Act.

Conclusion.

We believe it is evident from the foregoing that the circumstances of the within cause, the importance of the questions involved, the uncertain state of the law on the subject matter created by the Opinion below, compel the granting of the within Petition and the issuance of the Writ as prayed.

Respectfully submitted,

HODGE, JACKSON, KUMLER & CROSKEY,
By MORTON B. JACKSON,
Attorneys for Petitioner.